

Media use of Fol surveyed: New Zealand puts Australia and Canada to shame

A quantitative survey of thousands of news stories in four nations has revealed that few Australian journalists use Freedom of Information (Fol) requests as a news gathering tool. In contrast, however, their New Zealand counterparts are some of the heaviest Fol users in the English-speaking world. Among the survey's more unexpected outcomes was another discovery that in relative terms New Zealand journalists lodge many more Fol requests than their United States colleagues. In addition to presenting the raw data, this article examines probable reasons for the survey findings.

The survey methodology involved using a combination of journalistic techniques including advanced computer-assisted reporting statistical methods and content analysis. The results were based on detailed studies of on-line newspaper archives in Australia, Canada, New Zealand — all of which have Westminster systems of government — and in the United States, with its republican presidential system.

The Australian and New Zealand sections of the survey were conducted by the writer but it was not possible to gain direct access to all the relevant data in the United States and Canada. Results from the latter two nations were therefore based on data collected by credible others — in Canada's case a federal government task force and in the United States, the National Security Archive at George Washington University.¹ In each of those nations relevant data was extracted from computerised newspaper archives via Lexis-Nexis and Dow Jones.²

While it was possible to obtain figures relating to Fol requests lodged by journalists at all levels of government in Australia, New Zealand and the United States, it was only possible to obtain data on federal Fol requests by Canadian journalists. Time-lags in reporting some results meant there were also differences in the dates of the surveys, with the surveys of Australia and New Zealand media conducted over 12 months from 31 March 2001 to 31 March 2002, while the United States survey covered the 2000–2001 financial year and the Canadian survey period was the 2000 calendar year. None-the-less, the surveys were each conducted over a single 12-month period between January 2000 and 31 March 2002. Therefore, while not pretending to offer an absolutely definitive picture, the surveys were clearly indicative of national trends.

The United States

The National Security Archive is the largest non-profit user of the United States federal *Freedom of Information Act*, FOIA.³ The organisation conducted a detailed on-line survey of United States newspapers which showed that:

Documents released under federal, state and local *Freedom of Information Acts* [in the United States] sparked more than 3,000 news stories in 2000 and 2001 (according to the Archive's searches of on-line databases), exposing data of major public interest ...⁴

The director of the Archive's Freedom of Information Project, William Ferroggiaro, said the survey involved searching newspaper archives accessed via Lexis-Nexis and Dow Jones for the terms 'FOIA' or 'Freedom of Information Act' over a 12-month period.⁵ He said it was probable that the search captured wire service articles as well as individual newspaper articles — a factor which could mean that the tally of 3000 Fol-based articles could have been somewhat overstated as some syndicated wire service stories might have been counted more than once. In the context of the survey it is highly significant that a former chief staffer for the House of Representatives committee that had jurisdiction over FOIA, Robert Gellman, reported that relatively few United States journalists actually used Fol — often because they did not need to. In his 17 years with the committee Gellman worked on some of the major FOIA amendments in his nation. He said:

First, journalists are lazy. Many don't bother to make formal requests, but they threaten to sometimes. The threats can be effective because bureaucrats are lazy too and they will turn over/leak information rather than go through the FOIA paperwork. Reporters have told me for years that mentioning FOIA can be very useful. ... FOIA is a last resort. FOIA marks the borders of what can be withheld ...⁶

Gellman's observations were supported by the work of two Washington-based Heritage Foundation researchers into Fol use in 2001. They found that only 5% of 2285 FOIA requests submitted to four federal agencies during the first six months of 2001 were lodged by journalists.⁷ The analysis found that journalists were actually among the least frequent users of Fol in the United States and that 40% of requests were from corporations, 25% from lawyers and 16% from individuals who did not identify their employment.

Australia

The survey of Australian media found that Fol applications led to the publication of only 382 news stories in Australia in 2001–2002. It showed that only 23 Fol requests which resulted in publication of stories during the 12 months were lodged by media outlets under federal Fol legislation. A further 162 requests which sparked stories were for state and local government information. Over 100 of the latter requests were generated by just two publications — Queensland's *Courier-Mail* (87), and Victoria's *Herald Sun* (20). The remaining 197 requests which resulted in media reports were lodged, not by media outlets, but by opposition members of parliament — meaning that Australia's politicians were greater users of Fol than its journalists.

The survey also revealed that there were more articles criticising Australia's state and federal Fol laws (267) than there were stories resulting from Fol applications lodged by media outlets.

Canada

It was not possible for the writer to access enough Canadian media outlets via the Internet and World Wide Web to accurately survey of the use of Fol by Canadian media.

However, the Canadian Government's Access to Information Review Task Force,⁸ which was charged with reviewing that nation's federal Fol laws from 2000 to 2002, conducted a detailed survey of how Canadian journalists had used Fol in selected years from 1985 to 2000. The survey was not fully comparable with the other surveys discussed here because it focused solely on federal/national Fol requests whereas the other three surveys considered requests lodged with different levels of government. Despite that, there were enough close similarities in survey methods and results to be able to compare national trends.

The survey found that in 2000 there were 1911 newspaper articles published in Canada which referred to specific requests for information.⁹ A further 485 articles contained comments on Canada's *Access to Information Act*, with the majority being criticisms of the Act and/or its administration. Unfortunately the survey did not reveal how many Fol requests which sparked news stories were lodged by opposition politicians. However, separate research conducted by the Review Task Force revealed that:

... in 2000 — 2001, businesses made more use of the [*Access to Information*] Act than any other group (40.9 per cent), followed by the general public (31.5 per cent), organizations (16 per cent), the media (10.8 per cent) and academics (0.8 per cent). While usually included in the general public category, requests from parliamentarians are estimated to be 10 per cent of all requests.¹⁰

Those figures are comparable with figures from Australia and the United States. Among other things they indicate that, comparatively, less than 11% of Fol requests in either Australia, Canada or the United States were from journalists but that journalists in Australia and Canada apparently made greater use of formal Fol requests than journalists in the United States.¹¹

New Zealand

In New Zealand's case, it was possible to conduct a detailed survey of the nation's major newspapers; although it was not possible to survey broadcast media because there was insufficient access to archived transcripts of news and current affairs programs. But the survey of New Zealand newspapers was detailed and revealing.

One of the striking things about the New Zealand press is the high number of daily newspapers relative to population size.¹² The survey of newspaper articles in that nation was over the year from 31 March 2001 to 31 March 2002.¹³ It revealed that newspaper journalists lodged 466 Fol requests seeking information from the national government and/or local authorities which resulted in the publication of stories during the 12 months. A further 68 requests which resulted in newspaper articles were lodged by opposition members of parliament, making a total of 534 news stories. Of that number, 534 stories resulted from requests lodged with the National Government and 32 from applications made to local councils. Of 15 other articles or comment pieces which touched on either the *Official Information Act 1982* (New Zealand's Fol law pertaining to central government agencies) or its *Local Government Official Information and Meetings Act 1987* (for local and regional authorities) there was

negligible criticism of how the laws operated. In addition to the articles specifically stemming from Fol requests or commenting on the operation of the statutes, there were another 124 general references to Fol, many of which related to official inquiries and court cases and/or to individuals who had lodged their own Fol requests.

Interpreting the figures

Comparative results from the surveys in each nation are presented in the following four graphs. The data are collated and depicted in two ways, first as raw figures and, second, in terms of published news articles per 100,000 people.

Federal/National Government Fol requests which resulted in news stories over a 12-month period in 2000 or 2001/2002

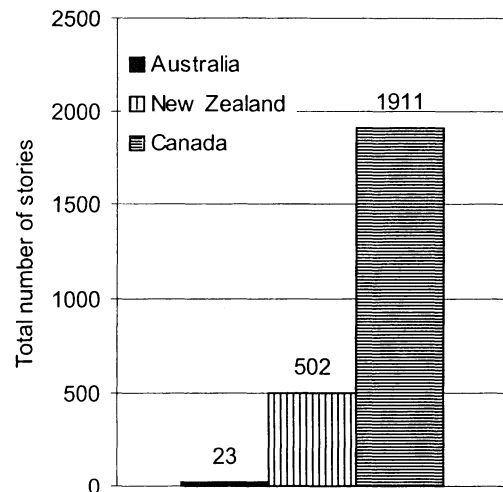


Figure 1: Raw results expressed as the total number of news stories involving national Fol requests

The graph in *Figure 1* plots the total number of Fol requests to national/federal government agencies that led to news stories in Australia, New Zealand and Canada over a year. The United States figures could not be included in this graph because it was not possible to separate United States federal figures from those for state and local governments; consequently they are dealt with later. The graph makes it clear that the sheer number of national (federal) government Fol-based news stories published in Canada in the survey period out-numbered the total of all national Fol-based stories in Australia and New Zealand.

But raw numbers can be misleading. More meaningful comparisons emerged by adjusting the survey findings to express the number of national government Fol-related articles published in each of the three Westminster nations in terms of articles per 100,000 people. The adjusted result is depicted in *Figure 2*. It is based on a population of Canada at the time of writing of about 30 million people, about 20 million in Australia and about 4 million in New Zealand.

In a dramatic reversal of the picture painted by the raw figures, *Figure 2* shows that per head of population, New Zealand newspaper journalists were proportionately much greater users of Fol at a national level than newspaper journalists in Australia or Canada. Further, in

comparative terms of stories per head of population, New Zealand journalists wrote nearly twice as many national FoI-based articles as Australian and Canadian journalists combined. Interestingly, *Figures 1 and 2* also indicate that Australian newspapers ranked a long last in both the raw use and adjusted figures.

Federal/National Government FoI requests for 100,000 people which resulted in news stories over a 12-month period in 2000/2001 or 2001/2002

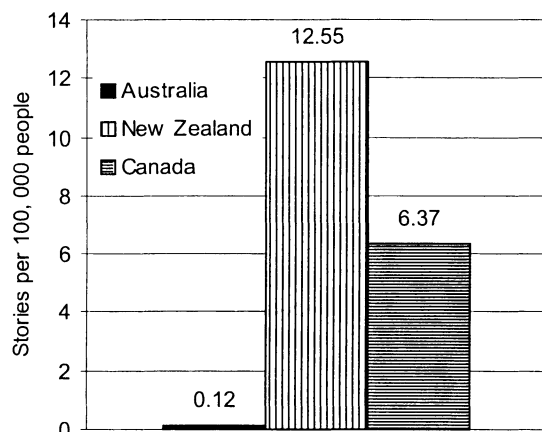


Figure 2: Number of national FoI-based articles adjusted for population and expressed as number of stories per 100,000 people

While it was not possible to obtain data on state/provincial and local government requests in Canada and the only figures which could be obtained for the United States were combined results for stories based on state, local and federal requests, it was possible to compare the number of stories resulting from requests lodged with all levels of government in Australia, New Zealand and the United States. Bearing in mind that New Zealand is a unitary state and not a federation and therefore only has national and local governments while Australia and the United States have federal, state and local government structures, *Figure 3* shows that in raw terms United States journalists lodged more FoI requests at all levels than their Australian or New Zealand counterparts.

News stories resulting from FoI requests lodged with all levels of government from national to local

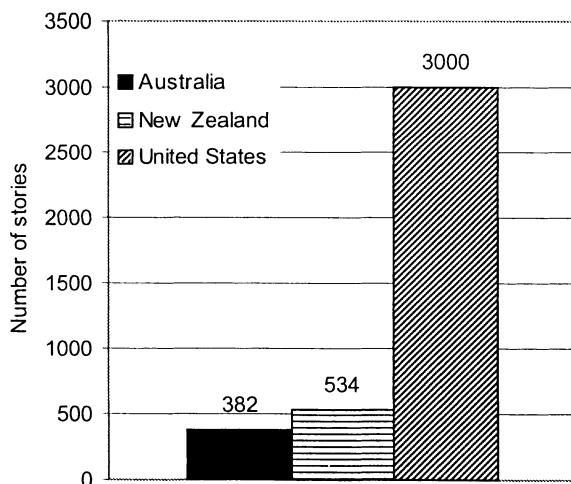


Figure 3: Total number of FoI-based stories sourced from all levels of government.

Superficially, *Figure 3* appears to confirm an expectation that FoI might be used to better effect by United States journalists. That expectation is consistent with the fact that the United States has the oldest FoI laws in the nations considered in the survey,¹⁴ that it has the most effective FoI laws, and that those laws are supported by other media-positive legislation such as the First Amendment to the Constitution with its guarantees of a free press and freedom of speech. However, the United States, with about 278 million people at the time of writing, had a population more than five times the total population of the three Westminster nations — which only had a combined total of about 54 million. So again the picture changed dramatically when the figures were adjusted for population and expressed in terms of stories per 100,000 people. The adjustment is reflected in *Figure 4*. It shows that per head of population, New Zealand newspapers published more than 12 times more FoI-based articles in the survey period than United States papers and that the New Zealand total was nearly seven times greater than Australia's. In population adjusted terms, however, even the Australian press published close to twice as many FoI-related articles as the United States press.

News stories resulting from FoI requests lodged with all levels of government in Australia, the United States and New Zealand per 100,000 people in 2001/2002

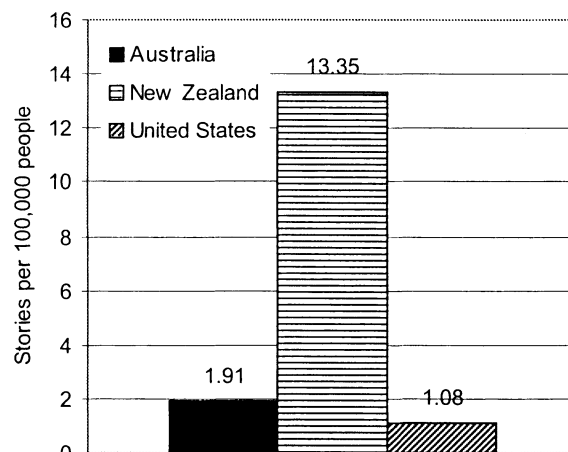


Figure 4: Total number of FoI-based articles from all levels of government in Australia, the United States and New Zealand adjusted for population and expressed as number of stories per 100,000 people.

Conclusions

The overwhelming conclusion to be drawn from the surveys was that United States and Australian journalists were not big users of their respective FoI laws but their New Zealand colleagues were comparatively much greater users. The result also infers that New Zealand had the most workable system of FoI of any of the Westminster nations considered in the surveys while Australia had the least workable. However, the survey result must be viewed in light of Gellman's point that journalists in the United States tend not to lodge formal FoI applications because they can often gain access to government information without resorting to formal legal process.¹⁵

It should also be remembered that there are very significant differences between FoI statutes and how they are administered in different jurisdictions.

As mentioned previously, there are also constitutionally protected rights of freedom of the press and freedom of speech in the United States which are either weaker, or do not exist at all, in the Westminster nations. In the United States, Fol operates in a political climate where there is a constitutionally enshrined 'Bill of Rights'.¹⁶ None of the Westminster nations discussed here has such unequivocal constitutional statements.¹⁷ It is therefore more difficult for public servants¹⁸ in the United States to tinker with legislative matters, including Fol statutes, without acquiescence from the legislature than it is in Westminster nations.

To that can be added the fact that of the four nations considered here, only the United States has all the elements of a full separation of powers. Only in the United States is there a clearly defined separation between the legislature and executive — or administration as it is referred to. In that system the executive (which is headed by the president as chief executive) is better insulated from meddling legislators than is the case in Westminster system nations. In the latter jurisdictions there is no real separation between the executive and the legislature. The heads of different branches of the executive are Cabinet ministers and Cabinets are composed of members of the legislature. Thus Westminster system cabinets are all-powerful and it is relatively much easier for politicians to interfere in the administration of legislation and to influence regulatory processes, including those relating to Fol requests by journalists.

Examples of that interference can be seen in Canada and Australia where it has become common in recent years for government media advisers to be informed by public servants when 'difficult' Fol requests that might embarrass ministers or governments are lodged. All too often those advisers and their ministers subsequently play a part in thwarting the release of information, or at least delay release until the newsworthiness associated with a particular request is devalued by the effluxion of time. That type of interference, while certainly not unknown, does not appear to happen to the same extent in the United States. In that nation the whole system of government tends to have been more effective in discouraging deliberate bureaucratic delays from developing into a virtual art-form, as has happened in Australia and Canada. Related to that point, costs and charges are generally clearly set out in United States Fol statutes, most of which effectively exempt the media from payment. In Australia and Canada, however, recalcitrant public servants and secretive governments have found that imposing outrageous charges, or even just preparing astronomically expensive quotes, is an effective disincentive that discourages media requests generally, and especially requests which are potentially embarrassing.

The survey results can also be seen to reflect differences in the way Fol legislation is actually framed in each nation. For example, Fol statutes in Australia and Canada have many more, and much less clearly defined, exemptions and exclusions than the well defined set of nine exemptions prescribed in United States federal laws. Another major legislative difference can be seen in the fact that Cabinet documents are exempt from scrutiny in Australia but not in New Zealand. Then there is the

point that both Canada and New Zealand have independent commissioners or ombudsmen specifically charged with administering Fol, while Australia does not.

And none of the Westminster bureaucracies have a requirement found in the United States Fol laws which obligate agencies to provide 'electronic' reading rooms giving Web access to Fol material that has been released previously or which would be likely to be released in future. That is an important difference which adds weight to Gellman's observation that United States journalists often do not need to lodge formal Fol requests to gain access to government-held information.

Within the Westminster nations, New Zealand stands out as having developed a system of Fol which can be reasonably well accessed by journalists. Its system, while far from perfect, stands head and shoulders above the politically manipulated sham that Fol has degenerated into for journalists and consumers of news in Australia and Canada. The main reason for that difference appears to be that the New Zealand statutes were passed at a time in that nation's history when its governments, public servants and citizens jointly recognised that there was a need to overhaul government and steer it away from secrecy and towards transparency. Further, unlike Australia and Canada, New Zealand did not slavishly adopt the United States model of Fol — a model that works relatively well in the United States republican presidential system but which is almost bound to fail in Westminster system nations because United States Fol laws do not superimpose well on governments and administrations in other nations which are less open and less accountable.¹⁹ That key difference at least partly explains why the operation of the New Zealand Fol system is not plagued to the same extent by the tactics of prevarication which dog Fol in Australia and Canada.²⁰

It is also noteworthy in light of Australia's abysmal standing in the survey that with a couple of significant exceptions stemming from the work of a couple of exceptional journalists, Australian media generally seems to have given up the fight in relation to Fol. That became evident in 2000 when the Australian Senate's all-party Legal and Constitutional Legislation Committee conducted public hearings into proposed amendments to federal Fol laws.²¹ The suggested changes would have increased transparency in the public service and introduced greater accountability in government.²² Astonishingly — and despite the survey finding reported herein that there were more articles published in Australian newspapers critical of the administration of Fol than there were stories resulting from Fol applications — not one of the 18 individuals who made submissions to those hearings was a journalist or represented a media outlet.²³

Similarly, in Canada, too, news outlets also seem to lack the will to confront their federal government about its abuse of Fol. As leading Canadian Fol advocate Professor Alasdair Roberts²⁴ lamented in the *Vancouver Sun* in September 2003:

Although journalists use the [Access to Information] Act regularly, publishers and broadcasters don't invest the resources needed to make the case for openness. Too often, editors let assaults on openness pass without comment.²⁵

Such media apathy does not bode well for the future of Fol or, indeed, for open and accountable democracy, in Australia or Canada.

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10. Ibid.
11. At least in terms of the proportion of requests lodged.
12. Bill Rosenberg, News Media Ownership in New Zealand (2002) <<http://canterbury.cyberplace.org.nz/community/CAFCA/publications/Miscellaneous/mediaown.pdf>> (at 6 February 2004); Mass Media — Statistics New Zealand (2002) <<http://www.stats.govt.nz/domino/external/Web/nzstories.nsf/092edeb76ed5aa6bcc25afe0081d84e/5511b3d7bcc110aacc256b1f00006c42?OpenDocument>> at 4 June 2002;
13. The same period as the survey of Australian media.
14. With the first fully effective national Fol law having been introduced in the United States in 1966/67 compared with 1982/83 in Australia, Canada and New Zealand. The first nation to actually introduce Fol in the modern sense was Sweden/Finland in 1766. (See Stephen Lamble, 'Freedom of Information, a Finnish Clergyman's Gift to Democracy,' (2002) 97 *Freedom of Information Review* 2-8).
15. Gellman, above n 7.
16. The United States 'Bill of Rights' is generally taken to be the first 10 Amendments to that nation's Constitution.
17. Although the *New Zealand Bill of Rights Act 1990* does affirm and promote human rights and fundamental freedoms, while the *Canadian Charter of Rights and Freedoms*, a statute which has constitutional standing, 'guarantees' specific rights and freedoms including 'freedom' of the press.
18. With the obvious exception of the president, but even then under strictly defined rules.
19. See Stephen Lamble, 'United States Fol laws are a Poor Model for Statutes in Other Nations,' (2003) 106 *Freedom of Information Review* 51-5.
20. Lamble, above n 19.
21. Andrew Murray, 'Accountability,' Australian Democrats (2000) <http://www.democrats.org.au/parliament/index.htm?task=display&speech_id_display=568&name=Accountability&id=1> at 1 December 2000.
22. Senate Legal and Constitutional Legislation Committee. Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000, the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.
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Conclusive or ministerial certificates — an almost invisible blight in Fol practice

The existence of such certificates leaves the Act exposed to changes in political will and bureaucratic commitment to the principles and objectives of the legislation ... The current restraint in the use of these certificates is not cause to allow the damaging potential of this mechanism to go unchecked.¹

Under the Commonwealth *Freedom of Information Act 1982*, a Minister may issue a certificate that establishes conclusively that a document is exempt. Ministerial certificates may only be issued in relation to certain categories of exempt documents. Where a conclusive certificate has been issued, the power of the Administrative Appeals Tribunal (AAT) to review is limited.

Nine years down the track and the damaging potential of conclusive certificates at the federal level in Australia remains a live issue. The problem is that there is no effective way to monitor the use of, and justifications for, conclusive certificates. Researchers within Australia and internationally have been frustrated by this lack of basic knowledge about how often and for what types of documents conclusive certificates have been used in Australia.² The fragility of Australian Fol practice and legislation at the federal level is being exposed and placed under pressure by a resurgence in the use and application of Fol by the Australian media, NGOs, researchers and the federal parliamentary opposition. This resurgence